

No. 1-12-2221

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

DEBRA McCARTHY,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 08 L 7647
)	
DILLON'S DENTAL SERVICES, L.L.C.,)	The Honorable
)	Charles R. Winkler and
Defendant-Appellant,)	Thomas J. Lipscomb,
)	Judges Presiding.
and)	
)	
DR. JANICE McCANTS,)	
)	
Defendant.)	

JUSTICE STERBA delivered the judgment of the court.
Justices Hyman and Pierce concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not err in finding that a dental practice was vicariously liable for the negligence of a dentist, who was an independent contractor, where a patient did not specifically solicit treatment from the independent contractor and she was not informed that the independent contractor was not an employee. Transcripts included in an appendix do not supplement the record on appeal.

¶ 2 Dillon's Dental Services, L.L.C. (Dillon's Dental) appeals the circuit court's award of \$16,240, plus costs, in favor of Debra McCarthy regarding a dental malpractice cause of action. On appeal, Dillon's Dental claims that it was not vicariously liable for the alleged negligence of another dentist because that dentist was not an employee, but an independent contractor. Dillon's Dental also claims that McCarthy failed to establish a medical malpractice cause of action because the separation of a file during a root canal is not medical malpractice *per se*. Dillon's Dental further claims that McCarthy's expert was not qualified to opine on proximate cause and damages. For the reasons stated below, we affirm.

¶ 3 BACKGROUND

¶ 4 Dillon's Dental is an Illinois corporation and its principal owner is Dr. Jerry Dillon, DDS., M.S., Ph.D. Dr. Dillon is a board certified periodontist, who had been performing dental surgery for approximately 17 years when the underlying events occurred. Dr. Janice McCants treated McCarthy for a root canal on July 18, 2006, and during that procedure, a small file bit separated and became lodged in McCarthy's tooth number 15. Dr. McCants did not notify McCarthy about the file bit inside of her tooth. After that procedure, McCarthy experienced infections, pain and various discomforts associated with that tooth. On April 12, 2007, Dr. Dillon examined McCarthy and discovered the file bit. Dr. Dillon informed McCarthy about the file bit located in her tooth and discussed placing a crown on that tooth. Prior to that date, Dr. Dillon had not treated McCarthy.

¶ 5 On July 15, 2008, McCarthy filed a compliant against Dillon's Dental and Dr. McCants and on October 7, 2009, she filed an amended complaint against those defendants including a count for medical malpractice and spoliation of evidence. On December 18, 2009, Dillon's

Dental filed a verified section 2-619 motion to dismiss the amended complaint. McCarthy filed a response to the section 2-619 motion to dismiss on February 4, 2010, and attached to it her affidavit and her husband's affidavit. On March 4, 2010, the circuit court denied Dillon's Dental's motion to dismiss, and on April 29, 2010, Dillon's Dental filed an answer to McCarthy's amended complaint.¹

¶ 6 McCarthy, her husband Dion and her expert Dr. Jeff Feffer, a licensed dentist, testified during the bench trial.² Dr. Jerry Dillon also testified at trial. At the conclusion of the trial, the circuit court entered an order finding an employee/employer relationship between Dillon's Dental and Dr. McCants when the dental services were performed on McCarthy. The circuit court also found that Dr. McCants failed to meet the proper standard of care for the dental services that she negligently performed on McCarthy. The circuit court entered judgment in the amount of \$16,240 against Dillon's Dental and Dr. McCants jointly and severally, plus costs of suit totaling \$2,483.11. Dillon's Dental filed a motion to reconsider on July 22, 2011, which the circuit court denied. Dillon's Dental timely appealed.

¶ 7 ANALYSIS

¶ 8 As an initial matter, McCarthy claims that Dillon's Dental failed to file a complete record in accordance with Illinois Supreme Court Rule 323, and because of that failure, the circuit court's ruling should be affirmed. After reviewing the record, we agree with McCarthy that absent from the record are transcripts of testimony critical to issues Dillon's Dental raises on

¹ Throughout the underlying litigation, the parties filed numerous motions and pleadings that are not relevant to the issues presented in this appeal, including motions for default due to Dillon's Dental's failure to answer or respond to McCarthy's amended complaint and motions to vacated the orders entering default against Dillon's Dental.

² The record on appeal does not include a copy of McCarthy's or Dr. Feffer's testimony.

appeal. In particular, Dillon's Dental failed to include the testimony of Dr. Feffer, who was McCarthy's expert, in the record and merely attached its cross-examination of the doctor in the appendix to its brief on appeal.

¶ 9 According to Illinois Supreme Court Rule 321 (eff. Feb. 1, 1994), the record on appeal must, unless otherwise stipulated to, include the judgment appealed from, the notice of appeal, the entire original common law record and any report of proceedings. Illinois Supreme Court Rule 323 (eff. Dec. 13, 2005) requires the report of proceedings to include all of the evidence pertinent to the issues on appeal. In an appeal, the appellant must present a sufficiently complete record of the underlying proceedings to support a claim of error, and absent a complete record, the circuit court's order is presumed to be in conformity with the law and based on a sufficient factual basis. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984); see also *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 156 (2005), *Webster v. Hartman*, 195 Ill. 2d 426, 432 (2001). Any doubt that arises from the record's incompleteness is resolved against the appellant. *Foutch*, 99 Ill. 2d at 392.

¶ 10 Also, an appendix to a party's brief on appeal incorporating documents that are not included in the record are not properly before this court and may not be used to supplement the record on appeal. *McGee v. State Farm Fire & Casualty Co.*, 315 Ill. App. 3d 673, 679 (2000); see *Stutzke v. Illinois Commerce Commission*, 242 Ill. App. 3d 315, 317 (1993) (recognizing that a transcript included in the appendix of a party's brief does not make it part of the record in compliance with Illinois Supreme Court Rule 321). Accordingly, we must disregard the excerpts of Dr. Feffer's testimony that Dillon's Dental included in its appendix, as well as references to that transcript, for failure to comply with Rules 321 and 323. Absent the transcript of Dr. Feffer's

testimony, the record is inadequate to support Dillon's Dental's two claims on appeal that the doctor was not qualified to opine on proximate cause and damages and that the elements of a malpractice cause of action were not satisfied. Although Dillon's Dental cites to portions of Dr. Feffer's testimony in its brief, there is nothing in the record allowing this court to independently verify the cited testimony and to analyze the impact of the doctor's statements. Moreover, our review of the record has not disclosed a basis to disturb the circuit court's ruling. Thus, the circuit court's finding that McCarthy established the elements of a cause of action for medical malpractice is presumed to be in conformity with the law and supported by sufficient facts.

¶ 11 We next turn to address Dillon's Dental's claim that the circuit court erred in finding that it was vicariously liable under a principal-agent relationship for Dr. McCants's negligent actions. Dillon's Dental contends that Dr. Dillon did not treat McCarthy, he had no knowledge of any problems that she was experiencing with the root canal and she did not complain to him despite returning to the office repeatedly for care. For those reasons, Dillon's Dental asserts that judgment should be entered in its favor.

¶ 12 Although Dillon's Dental has not labeled its request for relief as a motion for judgement notwithstanding the verdict, because it requested judgment to be entered in its favor, it, indeed, is seeking that relief. A court grants a judgment *n.o.v.* "only when the evidence and inferences therefrom, viewed in the light most favorable to the nonmoving party, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand." *Ries v. City of Chicago*, 242 Ill. 2d 205, 215 (2011). We review requests for a judgment *n.o.v. de novo. Id.*

¶ 13 Turning to the merits of Dillon's Dental's claim, we note that the seminal case of *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 518 (1993), provides the framework for finding

a hospital liable in a medical malpractice case for the negligent acts of a treating physician based on a principal-agent relationship. *Gilbert* addressed the liability against a hospital, but the rationale of that case should not be limited to only hospitals and should be equally applied to medical facilities in general. Under the theory of apparent authority articulated in *Gilbert*, a principal will be bound by the authority expressly given and the authority he appears to give to an agent. *Id.* at 523. Apparent authority is defined as the authority that the principal knowingly permits the agent to assume, or the authority that the principal holds the agent out as possessing. *Id.* Apparent authority is also the authority that a reasonably prudent person would naturally suppose the agent to possess in light of the principal's conduct. *Id.* If a patient knows, or should have known, that a treating physician is not an employee but an independent contractor, then the medical facility will not be liable for the physician's actions. *Id.* at 522.

¶ 14 According to *Gilbert*, for a medical facility to be held liable under the doctrine of apparent authority, a patient must demonstrate that: (1) the facility, or its agent, acted in a manner that would lead a reasonable person to conclude that the alleged negligent individual was an employee or agent of the facility; (2) where the acts of the agent creates the appearance of authority, the patient must also prove that the medical facility had knowledge of and acquiesced in them; and (3) the patient acted in reliance upon the conduct of the medical facility or its agent, consistent with ordinary care and prudence. *Id.* at 525. To satisfy the “holding out” element, it is not necessary for the medical facility to expressly represent that the allegedly negligent treating physician is an employee. *Id.* Instead, the “holding out” element is satisfied if the medical facility holds itself out as a provider of care without informing the patient that the care is provided by independent contractors. *Id.* The “justifiable reliance” element is satisfied if the

patient relies upon the medical facility to provide care, rather than relying on or seeking a specific physician. *Id.*

¶ 15 In *James v. Ingalls Memorial Hospital*, 299 Ill. App. 3d 627, 631 (1998), this court reviewed the *Gilbert* decision and determined that "the relevant inquiry under *Gilbert* is whether the plaintiff knew that the physician was an independent contractor." In *York, M.D. v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 195 (2006), the Illinois Supreme Court upheld the principles first articulated in *Gilbert* when it agreed that a hospital may be held vicariously liable in a medical malpractice cause of action under the doctrine of apparent agency.

¶ 16 Dillon's Dental contends that the "holding out" and "justifiable reliance" elements required for apparent authority were not satisfied in the case *sub judice*, but we disagree. Adopting the principles set forth in *Gilbert* and reiterated in *James* and *York*, we conclude that McCarthy presented sufficient evidence to establish vicarious liability under an apparent agency theory. As evidence, McCarthy offered her own affidavit in which she averred that she sought dental care from Dillon's Dental and that she did not specifically seek care from Dr. McCants. McCarthy also averred that Dr. McCants, Dr. Dillon and other employees of Dillon's Dental did not inform her that Dr. McCants was an independent contractor and not an employee of Dillon's Dental. She also elaborated that she had no reason to know that Dr. McCants was an independent contractor. McCarthy further averred that she was not given a patient informed consent form at Dillon's Dental.

¶ 17 McCarthy also offered her husband's affidavit and testimony as evidence. Dion McCarthy's assertions in his affidavit mirror McCarthy's assertions, but he also averred that the patient informed consent form that he signed did not mention Dr. McCants or her independent

contractor arrangements with Dillon's Dental. Dion testified that he was not notified when he went to Dillon's Dental that there was a difference between it and Dr. McCants. He also testified that he did not see anything at the dental office that would have informed him that no relationship existed between Dillon's Dental and Dr. McCants. In fact, Dion's impression was that Dr. McCants was just one of the doctors on staff at the dental office.

¶ 18 Again, because the record is incomplete due to Dillon's Dental's failure to include Dr. Feffer's testimony, as well as McCarthy's testimony, we presume that the circuit court's ruling was based on the law and sufficient facts. Nonetheless, viewing the above evidence in a light most favorable to McCarthy in conjunction with the presumptions that arise due to an incomplete record, we conclude that the circuit court did not err in entering judgment in her favor. The contested "holding out" element was satisfied because Dillon's Dental held itself out as a provider of dental care without informing McCarthy that care may be provided by an independent contractor. *Gilbert*, 156 Ill. 2d at 525. The "justifiable reliance" element was equally satisfied because McCarthy sought dental care from Dillon's Dental generally and not from a specific doctor. Contrary to Dillon's Dental's claim, McCarthy's desire to be treated by a dentist who accepted Medicaid does not equate to a desire to seek treatment from a specific physician. Although *Gilbert* addressed a medical malpractice claim in a hospital context, public policy does not prohibit application of *Gilbert's* reasoning and rational to a two person dental office as urged by Dillon's Dental. Accordingly, we conclude that McCarthy established the elements required under the doctrine of apparent authority and judgment should not be entered in Dillon's Dental's favor.

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¶ 19

CONCLUSION

¶ 20 Based on a review of the limited record, the circuit court properly entered judgment in favor of McCarthy. Accordingly, we affirm the judgment of the circuit court.

¶ 21 Affirmed.